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Cover Page Footnote

The author wishes to acknowledge the support of his family who has encouraged him in writing this article and who has also supported him in any endeavor which he has chosen to undertake.

Laker Airways: Recognizing the Need for a United States-United Kingdom Antitrust Treaty

Mark P. Barbolak*

I. Introduction

The United States and the United Kingdom have long been in conflict over the extraterritorial application of United States antitrust laws. The British resent the often lucrative remedies that United States competition laws provide because they disagree with the philosophy behind those laws. Moreover, the British find particularly irritating the use of American discovery procedures within the United Kingdom since those procedures permit discovery well beyond the scope of discovery allowed under British law. Finally, the exercise by United States courts of long arm extraterritorial jurisdiction in the area of antitrust litigation is considered by the British to be an invasion of their sovereign rights. To thwart the United States in its imposition of American antitrust policy abroad, the British Parliament passed a blocking statute¹ in 1980 known as The Protection of Trading Interests Act.²

This article analyzes the conflict between the United States and the United Kingdom regarding the extraterritorial application of American antitrust laws. It begins by presenting a history of the dispute and then describes how that dispute culminated in a judicial

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The author wishes to acknowledge the support of his family who has encouraged him in writing this article and who has also supported him in any endeavor which he has chosen to undertake.

1. "A 'blocking statute' restricts 'the extent to which United States litigants can obtain evidence or production of commercial documents abroad for use in investigations or proceedings in the United States, and, secondly, the enforcement of United States judgments.'" Comment, *The Shipping Act of 1984: Bringing the United States in Harmony with International Shipping Practices*, 3 DICK. J. INT'L L. 198 n. 8 (1985) [hereinafter cited as *Shipping Act of 1984*] (quoting Pettit and Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697, 699 (1982)).

2. The Protection of Trading Interests Act, 1980 c.11, reprinted in 21 INT'L LEGAL MAT. 834 (1982) [hereinafter cited as PTIA]. See also *infra* notes 67-92 and accompanying text.

battle in the recent *Laker Airways* litigation.³

The article recognizes, however, that the question of extraterritorial application of United States antitrust laws is too political in nature to be determined in the judicial arena. Indeed, recent attempts by United States courts to balance United States and foreign interests⁴ have done nothing to assuage Britain's aversion toward American antitrust laws. This article therefore discusses the need for a bilateral antitrust treaty between the United States and Great Britain and recommends specific provisions to be included in that treaty.

II. Extraterritorial Application of United States Antitrust Laws

The United States has not always asserted extraterritorial jurisdiction in the area of antitrust law. Seventy-five years ago, in the seminal case *American Banana Co. v. United Fruit Co.*,⁵ Justice Holmes remarked that it was "surprising to hear argued" that acts outside the territory of the United States are governed by the Sherman Act.⁶ The law had changed by 1945, however, when in *United States v. Aluminum Co. of America (Alcoa)*⁷ Judge Learned Hand asserted extraterritoriality and declared that it was "settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."⁸ Judge Hand's decision in *Alcoa* has since stood as the impetus for extraterritorial application of American antitrust laws.⁹

However, Judge Hand did not allow the exercise of extraterritorial jurisdiction to remain unrestricted. For any defendant outside the United States to be held liable under the *Alcoa* decision his conduct must have both been intended to affect a market within the United States and have been successful in causing that intended effect.¹⁰ Thus, the major change in the law effectuated by Judge Hand's *Alcoa* decision was the shift in focus of the subject matter

3. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

4. See e.g., *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976). See also *infra* note 18 and accompanying text.

5. 213 U.S. 347, 355 (1909).

6. *Id.* For a general history of extraterritorial application of United States antitrust law, see generally 2 J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 142051 (1981) [hereinafter cited as ATWOOD & BREWSTER]; B. HAWK, *UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE* 22-44 (1979) [hereinafter cited as HAWK].

7. 148 F.2d 416 (2d Cir. 1945) (corporation which controlled ninety percent of a market could not escape charges of monopoly on grounds that the monopoly had been thrust upon it or that it assisted competition).

8. *Id.* at 443.

9. ATWOOD & BREWSTER, *supra* note 6, at 147-52.

10. 148 F.2d at 444.

jurisdiction inquiry "from the location of the conduct to the location of the effect."¹¹

Notwithstanding the restrictions established under this effects doctrine, as it became known, the *Alcoa* decision substantially extended the reach of American jurisdiction abroad.¹² Consequently, several courts¹³ and commentators, both foreign¹⁴ and domestic,¹⁵ took the view that the assertion of jurisdiction based solely on economic effects was improper. The British criticism of the application of the effects test was particularly severe.¹⁶

Partly due to this criticism some courts have within the past ten years begun to reconsider the effects doctrine.¹⁷ The first court to criticize the doctrine was the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America*.¹⁸ While not abandoning *Alcoa* altogether, the Ninth Circuit criticized the effects test as "incomplete" because it failed to consider other nations' interests.¹⁹ As an alternative, the *Timberlane* court suggested that a court first assess whether an alleged antitrust violation had some effect on United States commerce. If such an effect was found, then a balancing process would be applied to the case facts to determine whether "the interests of, and links to, the United States — including the magnitude of the effect on American foreign commerce — are sufficiently strong, vis-à-vis

11. Note, *The United States-Australian Cooperation Agreement: A Step in the Right Direction*, 24 VA. J. INT'L L. 127, 138 (1983) (footnote omitted) (citing Note, *Defining Jurisdictional Limits in International Antitrust: Should the EEC Adopt the Timberlane Approach?*, 5 FORDHAM INT'L L.J. 469, 479 (1982)) [hereinafter cited as Note, *Australian Cooperation Agreement*].

12. Indeed, regarding the reach of the effects doctrine elucidated in the *Alcoa* decision, two commentators have asserted: "Any conduct, anywhere, by anybody which was intended to restrain American import, export, or interstate trade or commerce in a manner unlawful by domestic standards would be prima facie within reach, with the defendant then having the burden of disproving an effect on that commerce." ATWOOD & BREWSTER, *supra* note 6, at 147-52.

13. See, e.g., *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3rd Cir. 1979); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976).

14. See Jennings, *Extraterritorial Jurisdiction and the United States and Antitrust Laws*, 33 BRIT. Y.B. INT'L L. 146 (1957); Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 CORNELL INT'L L.J. 195, 210-11 (1978) [hereinafter cited as Stanford].

15. Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 639 (1954).

16. 973 PARL. DEB., H.C. (5th ser.) 1533, 1535 (1979). See *infra* note 30 and accompanying text.

17. See, e.g., *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976).

18. 549 F.2d 597 (9th Cir. 1976). The basic allegation of the plaintiffs was that officials of the Bank of America and others located in the United States and Honduras conspired to prevent Timberlane from milling lumber in Honduras and exporting it to the United States, thus maintaining control of the Honduran lumber export business in the hands of a few select individuals financed and controlled by the Bank. See generally, *Recent Developments — Timberlane Co. v. Bank of America*, 4 BROOKLYN J. INT'L L. 97 (1977); *Recent Ninth Circuit Decisions — Application of the Sherman Act — A New Analysis — Timberlane Lumber Co. v. Bank of America*, 10 LOY. L.A. L. REV. 677 (1977).

19. 549 F.2d at 611-12.

those of other nations, to justify an assertion of extraterritorial authority."²⁰ The court listed several criteria which it recommended be weighed to "determine whether . . . the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction."²¹ The *Timberlane* court thus established a "jurisdictional rule of reason;"²² a "complex and multivariable comity analysis"²³ that is intended to address other nations' concerns.

The *Timberlane* balancing approach has not been adopted by many circuits.²⁴ The District of Columbia Circuit recently rejected that approach, for example, in the *Laker Airways* litigation.²⁵ In addition to this lack of support within the United States, foreign governments "continue to protest" that the *Timberlane* test is a violation of international law.²⁶

20. *Id.* at 613.

21. *Id.* at 614. The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the location or principal place of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of the effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance of the violations charged of conduct within the United States as compared with conduct abroad.

In *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979), the court adopted the *Timberlane* factors but also expanded them to include:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nations has addressed the issue.

595 F.2d 1287, 1297-98.

22. *Id.* Kingman Brewster first recommended this approach 25 years ago in his book, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 298 (1958).

23. *ATWOOD & BREWSTER*, *supra* note 6, at 163.

24. *See, e.g., Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981); *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980).

25. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *see infra* notes 93-114 and accompanying text.

26. Note, *Australian Cooperation Agreement*, *supra* note 11, at 141 (commenting that the protest continues because even under a *Timberlane* approach, economic effects still serve as a basis of jurisdiction). Not only have a number of commentators rejected the *Timberlane* analysis, but some courts have also refused to adopt a *Timberlane* standard. *See, e.g., National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981) (plaintiff sought to enjoin defendants from terminating their "mastercharge" credit card business but because such termination could not be foreseen to have any appreciable anticompetitive effects on United States commerce, a violation of the Sherman Act would not be found); *In re Uranium Anti-*

III. Sources of British Antipathy Toward American Antitrust Laws

Unlike most areas of the law, the United Kingdom and the United States have little shared legal tradition in the area of antitrust law.²⁷ At the time of the *Alcoa* decision in 1945 no antitrust legislation existed in Great Britain.²⁸ In fact, it was only relatively recently²⁹ that the United Kingdom began regulating business practices. The difference in government policy toward business that is reflected in this divergent legislative treatment has for decades been the basis for the friction between the United States and Great Britain regarding the extraterritorial application of American antitrust laws by United States courts.³⁰

Although the differing philosophy regarding the control of business is the basis for the friction that has arisen between the United States and Great Britain, certain aspects of the extraterritorial application of United States antitrust laws have particularly piqued British ire. The first concerns the unpredictability of the effects doctrine. The British Secretary of State for Trade remarked in an address before Parliament, "The wide extent and fundamental uncertainty of this claimed reach of United States law through this pernicious extraterritorial effects doctrine has created uncertainty for international industry in this country and elsewhere."³¹

It is important to distinguish British concern regarding the application as opposed to the substance of the effects doctrine.³² As one British solicitor has remarked, "It is not so much the theoretical basis of jurisdiction which gives rise to difficulties but the application of accepted principles to particular circumstances."³³ Indeed, Britain

trust Litigation, 617 F.2d 1248 (7th Cir. 1980). The district court in *National Bank of Canada* did apply the *Timberlane* analysis, but on appeal the circuit court stated that the "critical factor" in its decision was made under the effects test. *National Bank of Canada*, 666 F.2d at 8. Although the *National Bank of Canada* court specifically remarked that it was not "questioning the pertinence of *Timberlane*," *id.*, its action amounted to a rejection of the balancing test.

27. Cira, *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. J. INT'L L. 247, 248 (1982) [hereinafter cited as Cira].

28. Britain's first antitrust law was not passed until 1948, see Monopolies and Restrictive Practices (Inquiry & Control) Act, 1948, 11 & 12 Geo. 6, Ch. 66. Today, the antitrust laws of the United Kingdom are centered upon the Restrictive Trade Practices Act 1976, c. 34. For a general discussion of this act, see Blythe, *The Extraterritorial Impact of the Antitrust Laws: Protecting British Trading Interests*, 31 AM. J. COMP. L. 99, 100-02 (1983) [hereinafter cited as Blythe].

29. See *supra* note 28.

30. Blythe, *supra* note 28, at 108-09.

31. 973 PARL. DEB., H.C. (5th ser.) 1533, 1536 (1979) (Secretary of State for Trade John Nott).

32. Griffin, *Possible Resolutions of International Disputes Over Enforcement of U.S. Antitrust Laws*, 18 STAN. J. INT'L L. 279, 285 (1982); Note, *Australian Cooperation Agreement*, *supra* note 11 at 167-68.

33. Silkin, *The Perspective of the Attorney General of England and Wales*, reprinted in PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER

would be hypocritical in flatly asserting that it does not recognize the extraterritorial application of competition laws based on an effects test.³⁴ As a member of the European Economic Community, Britain agreed to be bound by Article 85 of the Treaty of Rome which uses an effects test to assert extraterritorial jurisdiction.³⁵

The development of the *Timberlane* balancing process has not assuaged British concern with the uncertainty of the application of the effects doctrine. The reluctance of courts to accept the *Timberlane* analysis has made Britain, and other nations as well, "understandably hesitant to rely on *Timberlane* to restrain the alleged American tendency towards jurisdictional excess."³⁶

Another source of British antipathy toward the extraterritorial application of American antitrust law is that "rogue elephant"³⁷ of American antitrust: the availability of treble damages to private plaintiffs in an antitrust action. The Americans view treble damages as a deterrent to illegal activity in that they provide an incentive to victims of antitrust violations to act as "private attorneys general."³⁸ The British, however, regard treble damages as penal in nature.³⁹ The British government therefore claims that defendants sued by private plaintiffs risk double jeopardy because they are exposed to the possibility of being tried twice for the same offense — once in a criminal case brought under the criminal provisions of the Sherman Act and again under the "penal" treble damage provisions provided parties in civil actions.⁴⁰

A corollary to this concern regarding the treble damage provision is British criticism of the "unleashed prosecutorial discretion" that the United States antitrust laws give private litigants.⁴¹ The

LAWS 56 (J. Griffin ed. 1979).

34. Nonetheless, this assertion is still often made. See 973 PARL. DEB., H.C. (5th ser.) 1533, 1535.

35. Treaty Establishing the European Economic Community, Jan. 1, 1958, 298 U.N.T.S. 47. Since Jan. 1, 1973, Art. 85 has been directly applicable to the United Kingdom: European Communities Act 1972 (c. 68), § 2(1).

For a discussion of Article 85 and its extraterritorial application see R. Folsom, CORPORATE COMPETITION LAW IN THE EUROPEAN COMMUNITIES 72-73 (1978); HAWK, *supra* note 6, at 455-59; Blythe, *supra* note 28, at 106-08.

36. Cira, *supra* note 27, at 267.

37. Griffin, *The Incompatibility of International Accommodation and Private Attorneys General*, 14 CASE W. RES. J. INT'L L. 3 (1982).

38. United States Diplomatic Note concerning the U.K. Protection of Trading Interests Act, 21 INT'L LEGAL MAT. 840, 843 (1982). See also *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-46 (1977); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138-39 (1968).

39. 973 PARL. DEB., H.C. (5th ser.) 1533, 1536 (1979). See also *Shipping Act of 1984*, *supra* note 1, at 209 n.80.

40. Note, *Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law*, 81 COLUM. L. REV. 1097, 1103-04 (1981) [hereinafter cited as Note, *Power to Reverse*].

41. Note, *A Comparative Analysis of the Efficacy of Bilateral Agreements in Resolving Disputes Between Sovereigns Arising From Extraterritorial Application of American An-*

British assert that private litigants in deciding whether or not to sue do not take into account the same considerations that a public authority would in an effort to enforce the antitrust laws.⁴² The private litigant sues only for private monetary gain and fails to make any assessments, as would a public authority operating in the interest of society and the community as a whole, regarding the impact of that suit on the international community.⁴³

A further source of British hostility stems from the liberal use of discovery permitted under the American legal system.⁴⁴ Under the United States Federal Rules of Civil Procedure, a litigant may request discovery of *any* information which is "reasonably calculated to lead to the discovery of admissible evidence."⁴⁵ In addition, discovery requests are not limited to parties in the suit and can be for depositions as well as for documents.⁴⁶

In Great Britain, however, the rules regarding the scope of discovery are quite different. Indeed, the House of Lords recently characterized the United States' liberal discovery rules as nothing short of "fishing expeditions."⁴⁷ Under the English system discovery is much more limited.⁴⁸ It is restricted almost exclusively to the parties. Information may not be gathered from a "mere witness."⁴⁹ Moreover, unlike United States procedure, parties to the suit may only discover non-privileged documents after the pleadings are finalized in detail.⁵⁰ A British barrister would thus be expected to have proof of most of the elements of his or her case prior to discovery.⁵¹

A. Cases Which Have Intensified British Hostility

1. The North Atlantic Shipping Cases.—The North Atlantic

titrust Law: The Australian Agreement, 13 GA. J. INT'L & COMP. L. 49, 54 (1983) [hereinafter cited as Note, *Comparative Analysis of the Australian Agreement*]; *Shipping Act of 1984*, *supra* note 1, at 290 n.80.

42. United Kingdom Response to U.S. Diplomatic Note Concerning the U.K. Protection of Trading Interests Bill, 21 INT'L LEGAL MAT. 847 (1979); *see also* 973 PARL. DEB., H.C. (5th ser.) 1533, 1549 (1979).

43. 973 PARL. DEB., H.C. (5th ser.) 1533, 1549 (1979).

44. The United States is noted for the "liberality of its rules, the hunger of its lawyers, and the passivity of its judiciary." ATWOOD & BREWSTER, *supra* note 6, at 227.

45. FED. R. CIV. P. 26(b)(1).

46. FED. R. CIV. P. 26(a); *see generally*, Note, *The British Protection of Trading Interests Act of 1980: An Analysis*, 14 J. INT'L L. & ECON. 253, 260-61 (1980) [hereinafter cited as Note, *Protection of Trading Interests Act*].

47. *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, [1978] 2 W.L.R. 81, 87 [1978], 1 A11 E.R. 434, 442 (H.L. 1977).

48. *See* Note, *Procedural Aspects of Choice of Forum: A Comparative Look at English and American Discovery*, 2 REV. OF LITIGATION, 119, 122 (1980) [hereinafter cited as Note, *Procedural Aspects of Choice of Forum*].

49. *Id.* at 126-30.

50. Note, *Protection of Trading Interests Act*, *supra* note 46, at 261. *See also* Collins, *Opportunities for and Obstacles to Obtaining Evidence in England for use in Litigation in the United States*, 13 INT'L LAW. 27 (1978).

51. Note *Procedural Aspects of Choice of Forum*, *supra* note 48, at 120 n.12.

Shipping cases⁵² are examples of how American antitrust enforcement engendered British resentment. The cases arose in June 1979 after a lengthy Justice Department investigation which resulted in the indictment of seven corporations, two of which were British.⁵³ The defendants were charged with conspiracy to "fix, raise, stabilize and maintain price levels for the shipment of freight in the United States/Europe trade"⁵⁴ without seeking or obtaining the approval of the United States Federal Maritime Commission.

The matter ended with early pleas of *nolo contendere* by all defendants and the court imposed total fines of \$6.1 million, the largest total fines ever assessed in one antitrust case.⁵⁵ Subsequent to the criminal action, more than thirty treble damage complaints were filed which were then consolidated and certified as a class action and were settled for approximately \$51.4 million.⁵⁶

The *North Atlantic Shipping* cases aroused British resentment for two reasons. The first stemmed from the view that British companies were perceived to be subject to double jeopardy because they risked criminal judgments against them as well as an award of treble damages in the civil suits.⁵⁷ The second reason was based on the British (and European) philosophy that shipping in particular, because it is an international industry, should not be subject to intense regulation by any one nation. As the British Secretary of State for Trade explained, "The policy of the British Government, along with that of all European governments, has been to avoid detailed regulatory intervention in the commercial aspects of international shipping. We believe that to be the best way of achieving efficient and effective shipping services and protecting the interests of the consumer."⁵⁸ Britain therefore argued that the extraterritorial enforcement of United States antitrust laws in the *North Atlantic Shipping* cases infringed Great Britain's sovereignty.⁵⁹

2. *The Uranium Cases.*—In *Rio Tinto Zinc Corp. v. Westing-*

52. *United States v. North Atlantic Container Line, Ltd.*, No. 79-271 (D.D.C. filed June 1, 1979) (settled July 11, 1979, see *Cira*, *supra* note 27, at 250); *In re Ocean Shipping Antitrust Litigation*, 500 F. Supp. 1235 (S.D.N.Y. 1980), *settled*, 1982-1 Trade Cas. (CCH) ¶ 64,585 (S.D.N.Y. Jan. 19, 1982); *In re Unfiled Agreements in the North Atlantic Trades*, No. 79-83 (F.M.C. filed Aug. 14, 1979, *discontinued*, June, 1984) [these cases are hereinafter cited as *North Atlantic Shipping* cases].

53. See generally Note, *Protection of Trading Interest Act*, *supra* note 46, at 261-63.

54. *Id.* at 261.

55. *Cira*, *supra* note 27, at 251.

56. *Id.* at n.24 (citing Settlements of About \$51.4 Million Approved in Ocean Shipping Litigation, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 1052, at 370 (Feb. 18, 1982)).

57. See *supra* notes 39-40 and accompanying text.

58. 973 PARL. DEB., H.C. (5th ser.) 1533, 1538 (1979).

59. Note, *Protection of Trading Interests Act*, *supra* note 46, at 262.

house Electric Corp.,⁶⁰ Westinghouse was seeking evidence to prove the existence of a uranium cartel which had allegedly inflated the market price of uranium. Westinghouse needed the information to establish commercial impracticability in defense of breach of contract actions brought against it. The House of Lords prevented enforcement of discovery demands served by the District Court of Virginia on various Rio Tinto Zinc (RTZ) executives pursuant to letters rogatory.⁶¹ The Law Lords agreed with District Court Judge Mehrige who flew to London to rule on the dispute regarding the discovery demands. Judge Mehrige found that the RTZ employees had a valid fifth amendment privilege in refusing to answer questions during the requested deposition.⁶² In addition, the Law Lords also found that the RTZ employees could not be required to produce the documents because those documents could be used as evidence of a violation of Article 85 of the Treaty of Rome.⁶³

The uranium cases were "probably the event most responsible for turning British official opinion against American antitrust enforcement."⁶⁴ RTZ had, in fact, joined a uranium cartel, but this was in response to a ban by the United States on the importation of uranium.⁶⁵ Further British resentment was fueled when the Court of Appeals for the Seventh Circuit expressed anger in response to the filing of an amicus brief by the British government presenting British views on the American *Westinghouse* case. Court of Appeals Judge Campbell is reported to have exclaimed, "Shockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction."⁶⁶

IV. The Protection of Trading Interests Act

As a direct result of the strain placed on United States-British trade relations by the *North Atlantic Shipping* cases and the uranium case,⁶⁷ the British Parliament signed the Protection of Trading Interests Act (PTIA) into law on March 20, 1980.⁶⁸ The PTIA not

60. [1978] 2 W.L.R. 81, 1 A11 E.R. 434 (H.L. 1977). See generally, Kohlmeier, *The Uranium Affair*, 13 J. INT'L L. & ECON. 149 (1979) (outlining a history of the problems giving rise to the litigation).

61. [1978] 2 W.L.R. at 95, [1978] 1 A11 E.R. at 449. The letters rogatory sought the deposition of nine RTZ executives and also contained requests for documents. [1978] 2 W.L.R. at 84, [1978] 1 A11 E.R. at 440.

62. [1978] 2 W.L.R. at 90, [1978] 1 A11 E.R. at 445. For a first-hand account, see Mehrige, *The Westinghouse Uranium Case: Problems Encountered in Seeking Foreign Discovery and Evidence*, 13 INT'L LAW. 19 (1978).

63. [1978] 2 W.L.R. 103-05, [1978] 1 A11 E.R. 456-57.

64. *Cira*, *supra* note 27, at 250. See also *Shipping Act of 1984*, *supra* note 1, at 214.

65. Note, *Protection of Trading Interests Act*, *supra* note 46, at 264 n.68 (citing The Private Ownership of Special Nuclear Materials Act, 42 U.S.C. § 2201 (v) (1976)).

66. *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1254-55 (7th Cir. 1980).

67. See *supra* text accompanying notes 52-66.

68. See *supra* note 2. See also generally Blythe, *supra* note 28; Danaher *Anti-Anti-*

only stems from the hostility engendered by these two particular cases, but it also exemplifies the long festering British resentment toward the extraterritorial application of American antitrust laws in general.⁶⁹ The PTIA is therefore distinctly anti-American (and anti-antitrust) despite contrary assertions by the British Secretary of State for Trade.⁷⁰

For a blocking statute, the PTIA is unprecedented in both American⁷¹ and British experience.⁷² Previous blocking statutes were defensive in nature, affecting only requests for discovery in the evidence-gathering phase of a case.⁷³ Under Sections 5 and 6 of the PTIA, however, the British government adopted an offensive⁷⁴ stance which, in addition to restricting pre-trial discovery, also prohibits the post-trial enforcement of specific types of judgments.⁷⁵

This offensive character of the PTIA is found primarily in Section 6, generally known as the "clawback" provision.⁷⁶ This section allows citizens of the United Kingdom, or a body corporate of the United Kingdom, or any person carrying on business in the United

trust Law: The Clawback and Other Feature of the United Kingdom Protection of Trading Interests Act, 1980, 12 LAW & POL'Y INT'L BUS. 947 (1980) [hereinafter cited as Danaher]; Note, *Power to Reverse*, *supra* note 40; Note, *The Protection of Trading Interests Act of 1980 — Britain's Latest Weapon in the Fight Against United States Antitrust Laws*, 4 FORDHAM INT'L L. F. 341 (1981) [hereinafter cited as Note, *Britain's Latest Weapon*]; Note, *Protection of Trading Interests Act*, *supra* note 46; Comment, *The Protection of Trading Interests Act of 1980: Britain's Response to U.S. Extraterritorial Antitrust Enforcement*, 2 NW. J. INT'L L. & BUS. 476 (1980) [hereinafter cited as Comment, *Britain's Response to U.S. Antitrust*].

69. In a speech before the Parliament concerning the PTIA, Mr. Nott, the then British Secretary of State for Trade, remarked, "The Bill is a response to a situation of a very particular nature which has been developing over several decades and which in the past few years has become more acute." 973 PARL. DEB., H.C. (5th ser.) 1533 (1979).

70. Mr. Nott claimed that "this bill is not anti-American or indeed anti-anybody," *id.* at 1546. Nonetheless, the PTIA is "carefully tailored to counter American antitrust legislation." Note, *Britain's Latest Weapon*, *supra* note 68, at 372 n.151. See also, Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257 (1980) [hereinafter cited as Lowe].

71. United States Diplomatic Note Concerning the U.K. Protection Of Trading Interests Act, 21 INT'L LEGAL MAT. 840, 843 (1982).

72. See 973 PARL. DEB., H.C. (5th ser.) 1533, 1542 (1979).

73. For example, Britain's earliest blocking statute, the Shipping Contracts and Commercial Documents Act of 1964 was basically limited to denying foreign requests for evidence to be used in cases arising under objectionable foreign shipping regulations. Shipping Contracts and Commercial Documents Act of 1964, ch. 87. This Act was repealed by § 8 of the PTIA. See also Comment, *Britain's Response to U.S. Antitrust*, *supra* note 68, at 509; Comment, *Foreign Blocking Legislation: Recent Roadblocks to Effective Enforcement of American Antitrust Law*, 1981 ARIZ. ST. L.J. 945, 952 [hereinafter cited as Note, *Foreign Blocking Legislation*]; Note, *Shortening the Long Arm of American Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes*, 28 LOY. L. REV. 213 (1982); Shipping Act of 1984, *supra* note 1, at 214 n.113.

74. To some, "offensive" may mean both "aggressive" and "repugnant." See WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 1566 (3rd ed. 1966). As used in this article the term means the opposite of "defensive."

75. PTIA, *supra* note 2, at c. 11, §§ 5,6. See also Comment, *Britain's Response to U.S. Antitrust*, *supra* note 68, at 509.

76. Comment, *Britain's Response to U.S. Antitrust*, *supra* note 68, at 498. See also Cira, *supra* note 27, at 249 ("The clawback is a retaliatory measure aimed primarily at American antitrust treble damage actions.").

Kingdom to recover (clawback) the noncompensatory and punitive treble damage portion of an antitrust award.⁷⁷ Recovery is to be made from any assets of the originally successful antitrust litigant located within the jurisdiction of the United Kingdom.

Section 6 of the PTIA also acts to restrain the "unleashed prosecutorial discretion" that the United States grants private litigants to the distinct displeasure of the British government.⁷⁸ By enabling a defendant to recover the noncompensatory portion of an antitrust award, the PTIA very effectively weakens the treble damages incentive provided by the Clayton Act to private attorneys general.⁷⁹

Britain's aversion toward the liberal use of United States discovery is also evident in Section 2 of the PTIA. Section 2 allows the British Secretary of State the discretion to prohibit compliance with a discovery request or an order to produce commercial information⁸⁰ if it appears to him that the requirement is inadmissible.⁸¹ Section 2 codifies the House of Lords' holding in *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*⁸² where the Law Lords disallowed the release of information merely because it might lead to the discovery

77. PTIA, *supra* note 2, at c. 11, 6(1), 6(2). These sections do not apply to a defendant who was ordinarily resident in the overseas country whose courts awarded the punitive damages nor does it apply if the punitive damages were awarded based on activities exclusively carried on in the overseas country. *Id.* §§ 6(3), 6(4).

78. See *supra* text accompanying notes 41-43.

79. See United States Diplomatic Note Concerning the U.K. Protection of Trading Interests Act, 21 INT'L LEGAL MAT. 840, 843-44 (1982). One commentator summarized this inhibiting effect as follows:

The Act's real importance lies not in its actual implementation, but in British defendants' power to invoke it. Most antitrust cases are settled. The Act's drafters did not anticipate that a significant number of American antitrust judgments would be clawed back; rather, they designed the Act primarily to encourage 'out-of-court settlements at realistic levels.' Even if the Act is never actually used, in other words, its *in terrorem* effect alone should insulate all British defendants from the full force of section 4 of the Clayton Act.

Note, *Enjoining the Application of the British Protection of Trading Interests Act in Private American Antitrust Litigation*, 790 MICH. L. REV. 1574, 1577-78 (footnote omitted) (citing Wall St. J., Nov. 2, 1979, at 26, col. 3).

80. The request or order may be from a court, tribunal or authority of an overseas country. PTIA, *supra* note 2, at c.11 2(1)(a).

81. An order or requirement is inadmissible:

(a) if it infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom; or (b) if compliance with the requirement would be prejudicial to the security of the United Kingdom or to the relations of the government of the United Kingdom with the government of any other country.

Id. §§ 2(2)(a)-(b).

Subsection 3 specifies that an order or requirement is also inadmissible:

(a) if it is made otherwise than for the purpose of civil or criminal proceedings which have been instituted in the overseas country; or
(b) if it requires a person to state what documents relevant to any such proceedings are or have been in his possession, custody or power or to produce for the purposes of any such proceedings any documents other than particular documents specified in the requirement.

Id. § 2(3)(a)-(b).

82. [1978] 2 W.L.R. 81, [1978] 1 A11 E.R. 434 (H.L. 1977).

of other information that would be relevant at trial.⁸³ Section 2 also accords with Britain's "mere witness" rule.⁸⁴

It is important to note that the PTIA operates extraterritorially.⁸⁵ Under Section 6(5), "A court in the United Kingdom may entertain proceedings on a claim under this section notwithstanding that the person against whom the proceedings are brought is not within the jurisdiction of the court."⁸⁶ This jurisdictional mandate appears to abandon the fundamental jurisdictional principles previously espoused by British and international law.⁸⁷ Indeed, "if literally and liberally applied, the PTIA could have results that are as wanting in comity as various American actions have been said to have had."⁸⁸

Another interesting facet of the PTIA is that although it has an offensive nature, its language seems to be addressed only to protecting British defendants. It is doubtful that Parliament was contemplating a scenario where the PTIA would be applied to block a British plaintiff from pursuing an American cause of action. In fact, the Parliamentary debates concerning the PTIA are silent on this point. Any doubts as to whether or not the PTIA applies to British plaintiffs who use another nation's antitrust laws for their own benefit were put to rest when, in 1984, the British Secretary of State for Trade imposed the PTIA on Laker Airways, a British plaintiff.⁸⁹

V. An Analysis of the Laker Airways Litigation

The significance of the *Laker Airways*⁹⁰ case lies in the fact that it was the first United States antitrust proceeding against which the British courts applied the PTIA.⁹¹ More importantly, however,

83. [1978] 2 W.L.R. 607-10, 1 A11 E.R. 441-43. For a discussion of the holding see Comment, *Britain's Response to U.S. Antitrust*, *supra* note 68, at 507-08.

84. See *supra* text accompanying note 44.

85. See generally, Blythe, *supra* note 28, at 126; Danaher, *supra* note 68, at 960; Note, *Protection of Trading Interests Act*, *supra* note 68, at 279. Cf. Lowe, *supra* note 70, at 274-75 (asserting that the PTIA is only territorial and national in its jurisdictional reach).

86. PTIA, *supra* note 2, at c. 11 § 6(5).

87. For a discussion of these jurisdictional principles see generally Danaher, *supra* note 68, at 958-960.

88. *Cira*, *supra* note 27, at 249.

89. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 920 (D.C. Cir. 1984).

90. *Id.* For a discussion of the case see Meesen, *Antitrust Jurisdiction Under Customary International Law*, 78 AM. J. INT'L L. 783, 786-89 [hereinafter cited as Meesen]; Wassenbergh, *US [sic] Jurisdiction and Bilateral Air Agreements*, 9 AIR L. 170 (1984) [hereinafter cited as Wassenbergh] (this author criticizes Judge Wilkey's Circuit Court opinion in the *Laker* case as being too expansive, but many of the author's assumptions are based on the erroneous premise that the United States and the United Kingdom share concurrent jurisdiction). See *infra* note 101 and accompanying text.

91. Note, *The Impact of the British Protection of Trading Interests Act on the United States Antitrust Suit Brought by Laker Airways Against British Airways and British Caledonian*, 14 GA. J. INT'L & COMP. L. 181, 193 (1984) [hereinafter cited as Note, *Impact of the PTIA*].

Laker stands as an example of the clash of two fundamentally inconsistent competition policies in the context of private litigation.

A. History

Laker Airways' accusations of antitrust violations culminated in a "complex sequence of litigation and counterlitigation" in which the antitrust violations asserted by Laker were vigorously attacked by the foreign defendants (*i.e.*, British Airways, British Caledonian Airways, Lufthansa and Swissair).⁹²

The most recent bout in the American courts, *Laker Airways Ltd. v. Sabena, Belgian World Airlines*,⁹³ touched off a jurisdictional battle between the British and American courts that eventually involved the British Secretary of State for Trade. Laker filed its antitrust claims in the District Court for the District of Columbia and obtained a preliminary injunction restraining the defendants from taking any action in a British court that would impair the District Court's jurisdiction. Two foreign defendants in the *Laker Airways* litigation, British Airways and British Caledonian, obtained an injunction from the Court of Appeal of the United Kingdom restraining Laker from litigating its antitrust claims against them in the United States courts.⁹⁴ These two defendants then used this injunction to challenge the District Court's previously issued preliminary injunction.⁹⁵

Meanwhile, Laker appealed the injunction issued by the United Kingdom Court of Appeal and on July 19, 1984 the House of Lords unanimously held that Laker's complaint stated no cause of action in an English court.⁹⁶ On these grounds, the Law Lords held it was not

92. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 916 (D.C. Cir. 1984). Laker Airways Ltd. was founded in 1966 by Sir Freddie Laker. Laker Airways initially offered charter services between the United Kingdom and the United States. In 1971 Laker branched out into a scheduled transatlantic air service and began to operate "Skytrain" services between London and New York. At one point, Laker Airways was carrying one out of every seven scheduled air passengers between the United States and England. *Id.* at 917. In 1981 Laker's financial condition began to fail and at the same time the pound sterling suffered a devaluation. Since most of Laker's revenues were in pounds while most of its debts and expenses were in dollars, Laker ran into repayment difficulties. Laker then sought to have its payment obligations re-financed, but allegedly members of the International Air Transport Association (IATA) conspired to pressure Laker's creditors into rejecting the refinancing scheme. At the same time IATA members allegedly initiated a sequence of low predatory prices. As a result of these alleged conspiracies, Laker was forced into bankruptcy. *Id.* at 916-17. See also Note, *Impact of the PTIA*, *supra* note 91 at 181 n.1.

93. 731 F.2d 909 (D.C. Cir. 1984).

94. *Id.* at 920.

95. *Id.* at 918.

96. The Law Lords noted that "because the predominant purpose of the acts of [the defendants] that are complained of was the defense of their own business interests as providers of scheduled airline services on routes on which Laker was seeking to attract customers from them by operating its Skytrain policy any English cause of action, for conspiracy would be ruled out under . . . English (as well as Scots) law . . ." [1984] 3 W.L.R. 413, at 420.

unconscionable to allow Laker to proceed in the United States courts. Laker was therefore permitted to pursue its appeal in the Court of Appeals for the District of Columbia Circuit. That Court of Appeals held that the District Court's injunction was proper and that Laker was free to proceed against the foreign defendants.⁹⁷

While the English and American courts were deciding the injunction issue, the British Secretary of State for Trade issued orders and general directions under the PTIA prohibiting persons who carried on business in the United Kingdom, with the exception of American air carriers, from complying with any orders issued in connection with the United States antitrust actions against United Kingdom airlines.⁹⁸ Although Laker applied for judicial review of the British Secretary of State's order, the Law Lords affirmed the Court of Appeal's refusal of judicial review. The order therefore remained intact following the appeal.⁹⁹ The case was, however, settled in July, 1985.¹⁰⁰

B. Case Analysis — A Rejection of *Timberlane*

The opinion issued by the Court of Appeals for the District of Columbia Circuit in the *Laker* case¹⁰¹ is a scholarly one. The opinion provides an excellent analysis of the issues involved in a case in which the diametrically opposed antitrust policies of the United States and the United Kingdom collide "head-on."¹⁰²

Before it began discussing the jurisdictional facts contained in the case, the Court of Appeals made it clear that it would apply the *Alcoa* effects doctrine.¹⁰³ The court stated unequivocally that in its opinion the effects test was entirely consistent with nationally and internationally recognized limits on sovereign authority.¹⁰⁴ The court then observed that aside from the "unprecedented foreign challenge" to Laker's antitrust claims, there was nothing in the complaint or the

97. 731 F.2d at 955.

98. For a full text of the order, see *British Airways Board v. Laker Airways Ltd.*, [1984] 3 W.L.R. 413, 430-31.

99. *Id.* at 431-32. For an analysis of the order, see Note, *Impact of the PTIA*, *supra* note 91.

100. Wall St. J., July 15, 1985 at 10, col. 1.

101. 731 F.2d 909 (D.C. Cir. 1984).

102. *Id.* at 916. The court's conclusion that there was concurrent jurisdiction between the United States and Britain has not been made improper by the House of Lords decision in *British Airways Board v. Laker Airways Ltd.*, [1984] 3 W.L.R. 413. In that decision Lord Diplock noted that "there is a single forum only that is of competent jurisdiction to determine the merits of the claim; and the single forum is [an American] court." *Id.* at 420. Since the issue of jurisdiction was mooted by this House of Lords decision, this article will not deal in detail with the various injunctions issued by the American and British courts each in an effort to wrest jurisdiction from the other. Instead, the article will analyze the Circuit Court's rejection of the *Timberlane* balancing approach. For a detailed description of the balancing approach itself, see *supra* notes 17-23 and accompanying text.

103. 731 F.2d at 922. See *supra* text accompanying notes 8-12.

104. *Id.*

circumstances of the suit which suggested jurisdiction should not be exercised under the effects test.¹⁰⁵

Having dealt with the issue of the applicability of the effects doctrine, the court turned to the *Timberlane* balancing test. The *Timberlane* approach, the court declared, was unworkable under the facts of the *Laker* case.¹⁰⁶ In addition, the court believed there were unacceptable defects in the balancing process. For example, many of the factors set forth in *Timberlane* were already taken into consideration by courts in determining whether or not there was a sufficient basis for jurisdiction.¹⁰⁷ Other factors listed in the *Timberlane* opinion were rejected as being "essentially neutral in deciding between competing assertions of jurisdiction."¹⁰⁸

The Circuit Court's primary complaint with the *Timberlane* balancing process, however, concerned the inadequacy of any court to deal with essentially political factors. Throwing upon the courts the responsibility of determining the desirability and importance of regulating restrictive business practices was particularly troubling to the *Laker* court. In reference to the *degree* to which the desirability of regulation is generally accepted, the court stated that "[a]n English or American court cannot refuse to enforce a law its political branches have already determined is desirable and necessary."¹⁰⁹ But regarding the *importance* a regulating state may place in the regulation of business practices, the court simply noted, "We are in no position to adjudicate the relative importance of antitrust regulation or nonregulation to the United States and the United Kingdom."¹¹⁰ The court felt that the *Timberlane* process required a court to make these political determinations. This, the court said, was not within the competence of the judicial branch.

The Circuit Court in its *Laker* opinion added that it might be willing to accept the *Timberlane* balancing test if it could be assured that such a test would strengthen the bonds of international comity.¹¹¹ It did not believe, however, that the *Timberlane* analysis could guarantee increased comity.¹¹²

In its final analysis the Circuit Court also observed that due to obvious and unavoidable domestic biases, any court applying the

105. *Id.* at 946.

106. The court observed that "[T]his approach is unsuitable when courts are forced to choose between a domestic law which is designed to protect domestic interests, and a foreign law which is calculated to thwart the implementation of the domestic law in order to protect foreign interests allegedly threatened by the objectives of the domestic law." *Id.* at 948.

107. *Id.* For a list of the factors see *supra* note 21.

108. 731 F.2d at 949.

109. *Id.* (Emphasis deleted).

110. *Id.*

111. *Id.* at 950.

112. *Id.*

Timberlane decision would find it inherently difficult to balance United States interests against competing foreign interests.¹¹³ The court remarked candidly that "[w]hen there is any doubt [as to whether or not to assert jurisdiction], national interests will tend to be favored over foreign interests. This partially explains why there have been few times when courts have found foreign interests to prevail."¹¹⁴

For the reasons set forth above, the Circuit Court in the *Laker* case did not feel the *Timberlane* balancing process was a valid method under which to determine jurisdiction. And in any event, both judicial and scholarly criticism of *Timberlane* had so intensified by the time the Circuit Court rendered its *Laker* opinion, the court did not feel bound to follow the *Timberlane* decision.¹¹⁵

VI. Was the *Laker* Court's Rejection of *Timberlane* Proper?

The court's rejection of *Timberlane* was proper in that it recognized and accepted as valid the growing dissatisfaction with the balancing approach. The rejection also, however, signaled the need for the development of another solution to the problem of extraterritorial application of United States antitrust laws.

The court's strongest criticism of *Timberlane* was that it required the judicial system to balance what were essentially political factors.¹¹⁶ In forming this opinion the court relied on a growing domestic wave of criticism that pointed out that courts were ill-equipped and found it inherently difficult to neutrally balance competing international interests. As one noted scholar succinctly stated:

The development of processes to resolve conflicting claims of authority to forbid or require conduct within a nation's borders is most appropriately carried out by diplomatic exchange, not by judicial decisions in which a forum balances its own interests against the competing interests of other states.¹¹⁷

International criticism has also been levied against *Timberlane*.¹¹⁸ Interestingly enough, the British government is one

113. *Id.* at 951.

114. *Id.*

115. *Id.* In addition to the articles cited in the opinion, see Bork, *Introduction* [To Symposium on International Antitrust], 18 STAN. J. INT'L L. 243, 245 (1982); Feinberg, *Economic Coercion and Economic Sanctions: The Expansion of United States Extraterritorial Jurisdiction*, 30 AM. U. L. REV. 323, 331 (1981).

116. See *supra* notes 109-110 and accompanying text.

117. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 581 (1983). Professor Maier then went on to note several cases which purported to use a *Timberlane* balancing test but either gave foreign national interests short shrift or ignored them completely. *Id.* at 590-93.

Professor Maier's criticism of the *Timberlane* approach was relied upon by the Circuit Court in its *Laker* decision. 731 F.2d at 937.

118. See, e.g., Meesan, *supra* note 90, at 801-02; Wassenbergh, *supra* note 90, at 178 n.

of these international critics. In a diplomatic note regarding the PTIA the United Kingdom remarked that although *Timberlane* may "limit the circumstances in which the [antitrust] remedy may be available, these tests remain within these wider claims to jurisdiction to which Her Majesty's Government object."¹¹⁹

This international criticism, together with assertions of dissatisfaction domestically and the pointed rejection of the *Timberlane* analysis by United States courts,¹²⁰ indicate that the solution created by the *Timberlane* court has failed in its effort to resolve the problems stemming from excessive extraterritorial application of American antitrust laws. The problem is inherently too political for a judicial resolution to be possible.

VII. The Need for a Bilateral Antitrust Treaty

The *Laker* opinion drives home an important point: "Maintaining international competition is the proper business of diplomats and negotiation, not federal judges and litigation."¹²¹ Judge Wilkey, who wrote the District Court opinion in the *Laker* case, attempted to vent his frustration in failing to adequately balance the political interests in the case by writing:

[T]his court has neither the authority nor the institutional resources to weigh the policy and political factors that must be evaluated when resolving competing claims of jurisdiction. In contrast, diplomatic and executive channels are, by definition, designed to exchange, negotiate, and reconcile the problems which accompany the realization of national interests within the sphere of international association.¹²²

Current approaches to extraterritorial application of antitrust law are inadequate guides as to when jurisdiction may be asserted. This article has already discussed how the *Timberlane* approach is inadequate.¹²³ Other proposed solutions have been as inadequate as the *Timberlane*-type court-attempted solutions. The Foreign Trade Antitrust Improvement Act of 1982,¹²⁴ for example, accomplished little. The main purpose of the Act was simply to clarify, not change,

20; Note, *The Australia-United States Agreement on Co-operation in Antitrust Matters*, 33 INT'L & COMP. L.Q. 230, 231-32 (1984).

119. United Kingdom Response to U.S. Diplomatic Note, 21 INT'L LEGAL MAT. 847, 850 (1979).

120. See *supra* notes 24-25 and accompanying text.

121. Hammar skjold, *About the Need to Bridge a Jurisdictional Chasm*, 8 ANNALS AIR & SPACE L. 97 (1983) (quoting a Washington Post editorial of November 4, 1979).

122. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 955 (D.C. Cir. 1984).

123. See *supra* text accompanying notes 106-20.

124. The Foreign Trade Antitrust Improvements Act of 1982, 96 Stat. 1246, 15 U.S.C. § 6a 45(a)(3) (1982).

the prevailing judicial standard for determining the jurisdictional reach of American antitrust laws.¹²⁵ It was for this reason that the former Assistant Attorney General for Antitrust warned that it was "important not to expect too much from the Act."¹²⁶

Proposed Section 403 of the Restatement (Second) of the Foreign Relations Law also does little to clarify this troubled area of the law.¹²⁷ The Restatement proposes a test of "reasonableness." This test comes perilously close to the *Timberlane* test and its inherent defects. As would occur under a strict application of *Timberlane*, a court using the factors listed in the Restatement would "often find the factors favoring United States policy of greatest importance."¹²⁸ The Restatement thus does not provide any guarantee against the domestic biases of a United States court.

Likewise, the Bermuda bilateral agreement relating to air services between Britain and the United States (Bermuda 2)¹²⁹ is not an adequate solution to the antitrust conflict. Indeed, Nicholas Ridley, the British Secretary of State for Transport, recently asserted that Bermuda 2 is "virtually unworkable" because of the way it can be overridden by United States antitrust laws.¹³⁰

Great Britain's PTIA adds another dimension to the problems which must be resolved or mitigated by treaty. The inflexibility of the PTIA exacerbates the friction between the admittedly opposite regulatory philosophies of the United States and Great Britain.¹³¹

The solution to the current problem between the United States and the United Kingdom concerning the extraterritorial application of American antitrust laws is clearly a treaty:

In today's integrated world economy, the American interest in protecting its free-market system increasingly conflicts with the interests of foreign governments that deplore such 'legal imperialism' Bilateral or international treaties such as the one recently concluded between the United States and Australia, are

125. Shenefield, *Thoughts on Extraterritorial Application of the U.S. Antitrust Laws*, 52 FORDHAM L. REV. 350, 367 (1983) [hereinafter cited as Shenefield].

126. *Id.* at 366.

127. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2) (Tent. Draft No. 2) (1981).

128. Wallace, *Extraterritorial Jurisdiction*, 15 LAW & POL'Y INT'L BUS. J. 1099, 1106 (1983). See *supra* text accompanying note 113.

129. Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and North Ireland Concerning Air Services, July 23, 1977, 28 U.S.T. 5367, T.I.A.S. No. 8641.

130. AVIATION WEEK & SPACE TECH. 26 (November 5, 1984).

131. See *supra* notes 68-89 and accompanying text. Ironically, the fact that the PTIA is so caustic and its effects so harsh may alleviate the extraterritorial application of American antitrust law problems by providing an exceptionally strong incentive to both the United Kingdom and the United States to negotiate a mutually agreeable antitrust enforcement policy. 405 PARL. DEB. H.L. (5th ser.) 1518 (1980).

preferable to judicial attempts to resolve these controversies.¹³²

VIII. Proposed Treaty Provisions

The Australia-United States Agreement on Cooperation in Antitrust Matters (Australian Agreement)¹³³ and the Canada-United States Memorandum of Understanding with Respect to the Application of National Antitrust Laws (Canadian Memorandum)¹³⁴ clearly illustrate that the problems caused by the extraterritorial application of American antitrust laws can be resolved through international negotiations and intergovernmental agreements. The conflicts which led to the agreements between the United States, Australia, and Canada are substantially similar to those that are a current source of disharmony between the United States and Great Britain.¹³⁵ Thus the Australian Agreement and Canadian Memorandum provide the groundwork upon which to model a United States-United Kingdom antitrust treaty. Based on the Australian Agreement and the Canadian Memorandum, the remaining part of this article will recommend provisions that should be included in such a treaty.

A. Intergovernment Notification of Antitrust Law Implications

Article 1 of the Australian Agreement requires that the United States and Australia notify one another of government policies that may have antitrust implications for either country.¹³⁶ Section 2 of that same Article requires that the Department of Justice or the

132. Note, *The Inconvenient Forum and International Comity in Private Antitrust Actions*, 52 FORDHAM L. REV. 399, 400 (1983).

133. Agreement on Antitrust Cooperation, United States-Australia, June 29, 1982, ____ U.S.T. ____, T.I.A.S. No. 10365, reprinted in 21 INT'L LEGAL MAT. 702 (1982) [hereinafter cited as Australian Agreement]. See also Note, *A Comparative Analysis of the Australian Agreement*, supra note 41; Note, *Australian Cooperation Agreement*, supra note 11.

134. Memorandum of Understanding Between the Government of the United States of America and the Government of Canada as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, ____ U.S.T. ____, T.I.A.S. No. ____, reprinted in 23 INT'L LEGAL MAT. 275 (1984) [hereinafter cited as Canadian Memorandum].

135. Baker, *Antitrust Conflicts between Friends: Canada and the United States in the Mid-1970's*, 11 CORNELL INT'L L.J. 165 (1978). All three nations were affected by the Westinghouse/Uranium litigation. See Note, *Comparative Analysis of the Australian Agreement*, supra note 41, at 62-63; Note, *Australian Cooperation Agreement*, supra note 11, at 142-51. Moreover, Canada and Australia enacted blocking statutes soon after the Uranium litigation. See Note, *Foreign Blocking Legislation*, supra note 73, at 971 n.200. Dissatisfaction with broad discovery requests by U.S. litigants, *id.* at 974, and resentment towards treble damages, Note, *Australian Cooperation Agreement*, supra note 11, at 142, were factors which prompted Australia and Canada, like Britain, to enact blocking legislation.

For a general perspective of the Australian view of United States antitrust law, see generally, Pengilly, *Extraterritorial Effects of United States Commercial and Antitrust Legislation: A View from Down Under*, 16 VAND. J. TRANSNAT'L L. 833 (1983). For a Canadian perspective, see Gotlieb, *Extraterritoriality: A Canadian Perspective*, 5 NW. J. INT'L L. & BUS. 449 (1983); Stanford, supra note 14.

136. Australian Agreement, supra note 133, art. 1.

Federal Trade Commission notify the government of Australia of any United States government obligation arising under United States statutes or regulations that may impact upon Australian laws, policies, or national interests.¹³⁷

The Canadian Memorandum goes beyond the Australian Agreement by detailing situations in which notification is required.¹³⁸ Also unlike the Australian Agreement, which only allows such notification be transmitted along regular diplomatic channels,¹³⁹ the Canadian Memorandum provides for prompt notification where time is of the essence.¹⁴⁰

A notification provision is essential to a treaty or agreement between the United States and the United Kingdom because it outlines the method of communication to be used between the two countries. The more detailed and efficient the method, the greater the assurance that potential antitrust violations will be detected and prevented before a company from either country commits itself to conduct that is contrary to the antitrust laws.¹⁴¹ For this reason the more extensive Canadian Memorandum would provide the better model for any notification provision included in an antitrust agreement entered into between the United States and Great Britain.

B. Consultation Provision

Likewise, a consultation procedure similar to that contained in Article 2 of the Australian Agreement¹⁴² and Section 4 of the Cana-

137. *Id.* at art. 1(2).

138. According to the Canadian Memorandum, Situations requiring notification will include those in which:

- (i) An antitrust investigation is likely to inquire into the activity carried out wholly or in part in the territory of the other party;
- (ii) An antitrust investigation is likely to inquire into any activity carried out wholly or in part outside the territory of the investigating Party, and there is no reason to believe that the activity is required, encouraged or approved by the other Party;
- (iii) It is expected that information to be sought is located in the territory of the other Party;
- (iv) Information is sought to be gathered by the personal visit of antitrust officials to the territory of the other Party;
- (v) An investigation, whether or not previously notified, may reasonably be expected to lead to a prosecution or other enforcement action likely to affect a national interest of the other Party.

Canadian Memorandum, *supra* note 134, at § 2(3).

139. Australian Agreement, *supra* note 133, at art. 1(5).

140. Section 2(4) provides that "Where time is of the essence, initial notification may be provided by telephone communication between the Parties' antitrust authorities, with confirmation made promptly thereafter in writing by the above stated channels." Canadian Memorandum, *supra* note 134, at § 2(4).

141. Note, *Australian Cooperation Agreement*, *supra* note 11, at 155.

142. Article 2 states:

When it appears to the Government of the United States through notification . . . that a policy of the Government of Australia may have significant antitrust implications under United States law, the Government of the United States

dian Memorandum¹⁴³ should be incorporated into the proposed treaty. Such a provision would allow either the United States or the United Kingdom to communicate their respective interests directly to the opposite government without being forced to resort to the use of diplomatic notes.¹⁴⁴ As a result, each government would be able to consider one another's interests before enacting antitrust legislation.

C. *Required Consideration of the Opposing Nation's Interests*

It would be beneficial to both parties if the United States-United Kingdom treaty codified the need for each nation to seriously consider the opposing nation's interests during any period of consultation. Paragraph 5 of Article 2 of the Australian Agreement is an example of this type of provision:

Both parties during consultations shall seek earnestly to avoid a possible conflict between their respective laws, policies and national interests and for that purpose to give due regard to each other's sovereignty and to considerations of comity.¹⁴⁵

A paragraph detailing this requirement would not only give each party impetus for considering the other's point of view, it would provide a basis for demanding that one's own point of view be taken into consideration.

D. *Notification Prior to Thwarting Discovery Requests*

Section 5 of the Canadian Memorandum requires notification and consultation before a party institutes a defensive measure for the

shall communicate its concern and may request consultations with the Government of Australia. The Government of Australia shall participate in such consultations.

Australian Agreement, *supra* note 133, at art. 2.

143. Section 4 states in relevant part:

Either party may request consultation when it believes that an antitrust investigation, proceeding, . . . or action relating to an antitrust investigation or proceeding, is likely to affect its significant national interests or require the seeking of information from its territory.

Canadian Memorandum, *supra* note 134, at § 4.

144. A diplomatic note was the only means whereby the United States could express its concern over the PTIA to the United Kingdom Government. *See* United States Diplomatic Note Concerning the U.K. Protection of Trading Interests Act, 21 INT'L LEGAL MAT. 840 (1982).

145. Australian Agreement, *supra* note 133, at art. 2(5). The Canadian Memorandum states a similar purpose of conflict avoidance:

This Memorandum of Understanding outlines arrangements for notification and consultation between the Parties with respect to the application of their respective antitrust laws, with the purpose of avoiding or moderating conflicts of interest and policies. The Understanding also establishes procedures for cooperation in order to enhance the substantial benefits which both derive from mutual assistance in the enforcement of the antitrust laws.

Canadian Memorandum, *supra* note 134, at § 1.

purpose of thwarting a discovery request.¹⁴⁶ If this provision were incorporated into the United States-United Kingdom treaty it would deter the British Secretary of State from issuing blocking orders on discovery as was done in the *Laker* case.¹⁴⁷

E. Opinion Letters from the Department of Justice

Article 4 of the Australian Agreement provides a "unique process" whereby an Australian business can demand an opinion from the Department of Justice as to whether its proposed conduct is lawful.¹⁴⁸ Under the Agreement, the Justice Department's opinion is advisory only and is not binding on the Department. Such a provision would, from the point of view of British businesses, lend a degree of certainty to the application of the antitrust laws.¹⁴⁹

F. Limitations on United States Discovery Procedures

In order to protect British interests, the United States-United Kingdom treaty should contain a provision requiring American courts to postpone discovery abroad until it is clear that evidence from domestic sources is inadequate.¹⁵⁰ Since the American system of pleading is so fundamentally different from the British system, not allowing American (or British) litigants to discover information from "mere witnesses" would be unworkable.¹⁵¹ Nonetheless, these proposals might deter plaintiffs who use American antitrust laws from engaging in "fishing expeditions" in Great Britain.¹⁵²

G. Government Participation in Antitrust Suits

Two novel provisions, Article 6 of the Australian Agreement and Section 11 of the Canadian Memorandum, authorize Australia and Canada to demand that the United States government participate in private antitrust suits.¹⁵³ Both agreements obligate the United States to report to the court on the outcome of consultations between the respective governments.¹⁵⁴ The Canadian Memorandum

146. *Id.* § 5.

147. *See supra* note 98 and accompanying text.

148. Note, *Australian Cooperation Agreement*, *supra* note 11, at 157; Australian Agreement, *supra* note 133, at art. 4.

149. *See supra* note 31 and accompanying text.

150. Shenefield, *supra* note 125, at 371.

151. One commentator has noted that "English and American discovery are fundamentally and philosophically different, and . . . there is little hope of the English adopting American-style discovery or vice versa." Note, *Procedural Aspects of Choice of Forum*, *supra* note 48, at 130.

152. *See supra* note 44 and accompanying text.

153. Australian Agreement, *supra* note 133, at art. 6; Canadian Memorandum, *supra* note 134, at § 11.

154. Australian Agreement, *supra* note 133, at art. 6; Canadian Memorandum, *supra* note 134, at § 11.

also provides for participation by the United States government in private antitrust suits that have not been the subject of consultations, but this provision is unfortunately discretionary.¹⁵⁵

A governmental participation provision would alleviate British concern over the motives of private attorneys general¹⁵⁶ and therefore should be included in an antitrust agreement entered into by the United States and Great Britain. However, the requirement that the United States government participate in a private lawsuit at the request of the United Kingdom should be made mandatory on the American government. To avoid any abuse of this provision, the United Kingdom should not only have the duty to act in good faith, it should also be responsible to sift through the requests of those private litigants who request United States government intervention to be sure that those requests are reasonable. If notwithstanding British government review of these requests it appears to the United States that a request is frivolous, there should be intergovernmental consultations to determine the validity of each request.

The governmental participation provision should also require that the United States government give the court a "detailed" report. Such detailed report would allow for the application of a *Timberlane* analysis to a case because the political factors would have already been weighed by the political branch of the government prior to the court's attempt to determine jurisdiction.¹⁵⁷ As a result, the courts would be assisted in making the determination of whether or not to assert jurisdiction. Neither the Australian Agreement nor the Canadian Memorandum presently set forth any requirements as to the type or specificity of the report the United States government must submit to the court.¹⁵⁸

H. United States Government Recommendations Regarding Imposition of Treble Damages

In its report to the court in a private antitrust suit, the United States government should include a recommendation regarding whether or not the treble damages should be imposed. The trial

155. The Canadian Memorandum states:

When the conduct dealt with in a private antitrust suit has not been the subject of notification and consultation under this Understanding, the Party in whose court the suit is pending *may*, at the request of the other Party or on its own initiative, inform the court of how the national interest of the other Party may be implicated by the court or may offer to the court such other facts or views as it considers appropriate in the circumstance.

Canadian Memorandum, *supra* note 134, at § 11(2) (emphasis added).

156. See *supra* text accompanying notes 41-43.

157. A detailed report would certainly assuage Judge Wilkey's concern over engaging in the balancing of political factors as expressed in the Circuit Court opinion in the *Laker* Case, 731 F.2d 909 (D.C. Cir. 1984). See *supra* notes 108-09 and accompanying text.

158. Note, *Australian Cooperation Agreement*, *supra* note 11, at 156.

court would then have the discretion to award or not award such damages as it sees fit. (Under current law the award of treble damages is mandatory.¹⁵⁹)

Although this may be the most controversial recommendation made in this article (nothing resembling this type of provision is included in either the Australian Agreement or the Canadian Memorandum), the idea is not as radical as would first be supposed. Requiring government recommendations on the imposition of treble damages was proposed by the former Assistant Attorney General for antitrust, Mr. John Shenefield.¹⁶⁰ In addition, Professors Areeda and Turner, authors of the hornbook *Antitrust Law*, also suggested that the decision to award treble damages should be left to the discretion of the trial court.¹⁶¹ The same concept was supported by Paul McGrath, the former Justice Department's Chief Antitrust Enforcer, in a recent interview.¹⁶² He viewed the automatic tripling of antitrust judgments as often harmful and indicated that he personally would favor trimming the recovery in many private antitrust cases to actual damages.¹⁶³

Two arguments are generally made against this proposed modification of the antitrust laws to make the treble damage award discretionary. First, a discretionary award would dissipate the incentive for private parties to bring antitrust lawsuits because they would not be guaranteed the treble damage award.¹⁶⁴ While this complaint may have some merit if viewed solely from the domestic sphere, it

159. See Clayton Act, § 4, 15 U.S.C. § 15 (1976).

160. The best possible way to moderate the treble damage feature with respect to foreign defendants in appropriate cases, however, would be to give the Attorney General or the trial court discretion to limit recoveries to single damages. The Attorney General would be preferable on the one hand because he has access to the best possible information on the likely impact of the litigation on foreign relations, whereas a court would be required to get its information less directly. The court, however, would be immune from the kind of pressure litigants, including foreign governments, would attempt to exert. It might be best, therefore, to allow the Attorney General to make a recommendation to limit damages in the appropriate case while retaining discretion in the trial court to make the final determination. Shenefield, *supra* note 125, at 372.

161. After discussing the negative consequences of treble damages, Areeda and Turner remarked:

[A]ll of these difficulties could be ameliorated if trebling were discretionary rather than mandatory. Judges occasionally lament the apparent absence of such discretion. The language of the Clayton Act § 4 seems to have little room for judicial discretion. But it is by no means clear that unqualified statutory language cannot be interpreted to contain implied qualifications (1) in infrequent situations not within the contemplation of those who wrote the statute and (2) where qualification would best serve both the fundamental purposes of the statute and the ends of justice.

2 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 331(b) (1978) (footnotes omitted).

162. Wall St. J., Nov. 16, 1984 at 18, col. 1.

163. Mr. McGrath criticized automatic tripling not only because it "inhibits a great deal of procompetitive conduct" but also because it causes friction with U.S. trading partners abroad. *Id.*

164. Note, *The Antitrust Treble Damages Remedy*, 9 WM. MITCHELL L. REV. 435, 454 (1984) [hereinafter cited as Note, *The Antitrust Treble Damage Remedy*].

makes little sense when a defendant is a British national or other defendant who qualifies for protection under the PTIA. As previously noted, the PTIA has an *in terrorem* effect.¹⁶⁵ Making the award discretionary would therefore have no effect on a plaintiff's incentive to bring a suit where a defendant qualifies for protection under the PTIA, especially under the clawback provision.

The second argument against a discretionary award is that it forces the trial court to balance the values of both nations as well as the parties involved in addition to the facts and circumstances involved in the case. This, the objectors say, would make fashioning an equitable remedy in the form of an award of treble damages, or refusal to award such damages, an extremely difficult task.¹⁶⁶ This complaint would not be valid if the provision requiring the United States government to make a recommendation to the court regarding the award of treble damages were adopted into the United States-United Kingdom antitrust agreement. The government's recommendation would assist the judge in making his or her final determination and thus lighten the court's burden.

An additional advantage to making the award of treble damages discretionary with the court is that there would be no need to decriminalize the antitrust laws to placate British concerns regarding double jeopardy. It is the *automatic* tripling of damages to which the British object.¹⁶⁷ The proposed provision, with its discretionary aspect, would essentially invalidate this British complaint.

IX. Conclusion

A bilateral antitrust treaty would be a positive step in ending the antitrust cold war¹⁶⁸ that exists between the United States and the United Kingdom. Otherwise, by continuing to place the burden of resolving the antitrust dispute with the judiciary, the United States and the United Kingdom will continue to suffer from an internecine relationship in the area of antitrust law.

The *Laker* case illustrates the judiciary's inability to adequately handle the conflicts caused by the extraterritorial application of United States antitrust laws. The balancing of domestic and foreign interests in order to determine if extraterritorial jurisdiction is proper cannot be accomplished by the courts alone. The balancing must first be performed by the political branch of the government and guide-

165. See *supra* note 79. For a discussion of the clawback provision see *supra* text accompanying notes 76-79.

166. Note, *The Antitrust Treble Damage Remedy*, *supra* note 164, at 454.

167. See *supra* notes 39-40 and accompanying text.

168. John Shenefield used this term to describe the antitrust conflict existing among industrialized nations. Shenefield, *Extraterritoriality in Antitrust*, 15 LAW & POL'Y INT'L BUS. 1109, 1113 (1983).

lines must be established by that branch to aid the courts in making case by case determinations.

In addition to the inability of American courts to deal with these essentially political questions, Britain's frustration over the lack of a political solution has resulted in the enactment of British laws which have the potential of thwarting a proper reach of United States antitrust jurisdiction. To protect its citizens and its policy interests the United States must respond to this British legislation by proposing and entering into serious negotiations with the British government regarding the adoption of a United States-United Kingdom antitrust treaty.